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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/536,713	04/03/2006	Cecile Veerman	0470-051644	2876

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THE WEBB LAW FIRM, P.C.
700 KOPPERS BUILDING
436 SEVENTH AVENUE
PITTSBURGH, PA 15219

EXAMINER

KING, FELICIA C

ART UNIT	PAPER NUMBER
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1784

MAIL DATE	DELIVERY MODE
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09/30/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/536,713	Applicant(s) VEERMAN ET AL.	
	Examiner FELICIA C. KING	Art Unit 1784	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 July 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 47-105 is/are pending in the application.
- 4a) Of the above claim(s) 47-85,90,93,94 and 97-105 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 86-88,91,92,95 and 96 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>4/23/07</u> . | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of Group II claims 86 (100) and Species A (claims 91 and 95) in the reply filed on 7/29/10 is acknowledged. The traversal is on the grounds that the groups share a special technical feature that defines the contribution over the prior art and that proteins aggregated in fibrils is the feature. This is not found persuasive because although the groups disclose protein aggregated in fibrils, Group I is not "specially adapted for the manufacture of" Groups II or III. Further, Group I does not provide a contribution over the prior art since EP 0604684 [Abstract; and cols. 5 and 6; claims 1, 3, 14 and 15] contains the subject matter and process steps recited in Group I. Further Group II does not provide a contribution over prior art since US 5,437,885 discloses a protein formed in fibrils [col. 2, lines 34-48]. Further Group III does not provide a contribution over the prior art since WO 98/31240 discloses particulated proteins that have texturizing properties [pg. 2, lines 1-16].

However, examiner withdraws the species election to include Group II B claims 92-96 along with Applicants' election of Group II A claims 91 and 95.

The requirement is still deemed proper and is therefore made FINAL.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

5. **Claims 86, 87, 88, 91, 92, 95, and 96 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bernardin (US 3,993,794).**

Regarding Claims 86, 87, 92 and 96: Bernardin discloses proteins aggregated to produce microfibrils, that the microfibrillated protein has gel forming properties and that the microfibrillated protein is used in the preparation of meat products [col. 1, lines 46-61; col. 2, lines 9-22]. Although Bernardin does not disclose improved functional properties as compared with proteins that are not aggregated to produce fibrils, it would have been obvious to one of ordinary skill in the art that since Bernardin discloses the protein fibers have enhanced bite, texture and appearance that allows it to be used in meat products and that the fibers imitate the texture of meat, that the protein having a fibril

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texture would have had improved properties in the application of certain foods versus proteins that did not have the fibril texture.

Regarding Claim 88: Bernardin discloses proteins aggregated to produce microfibrils as discussed above. Since there is no evidence that the recited process produces a product that is materially different from what is disclosed in the prior art, claim 88 has been considered regarding its disclosure of protein in microfibril form.

“Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior art was made by a different process.” *In re Thorpe*, 777 F.2d 695, 698.

Regarding Claims 91 and 95: Bernardin discloses proteins aggregated to produce microfibrils as discussed above but does not explicitly disclose the protein used in dairy products. However, it would have been obvious to one of ordinary skill in the art to incorporate the protein of Bernardin in dairy products since Bernardin discloses the incorporation of the its protein in puddings, gelled desserts, and dressings and because these products have textures or consistencies that are similar to dairy products such as yogurt, cottage cheese, and other milk products etc.

Conclusion

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: Ohya et al. (US 4,430,356) discloses microfibrillar milk protein used in milk and meat products; Arima et al. (3,627,536) discloses proteinaceous fibers used in the preparation of simulated meat; Hayes et al. (US 3,870, 805) discloses texturized protein to improve the texture of meat like products; and Kawai et al. (US 4,165,392) discloses a fibrous protein with gelling properties.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to FELICIA C. KING whose telephone number is (571)270-3733. The examiner can normally be reached on Mon- Thu 7:30 a.m.- 5:00 p.m.; Fri 7:30 a.m. - 4:00 p.m. alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on 571-272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/F.K./

Examiner, Art Unit 1784

/Timothy M. Speer/

Primary Examiner, Art Unit 1784